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December 13, 2012

Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463  
VIA FACSIMILE: (202) 219-3923

**Re: MUR 6680 – Response to Complaint from Berg for Senate and 714 LLP**

Dear Mr. Jordan:

On behalf of our clients, Berg for Senate and Kelly J. Zander, in his official capacity as Treasurer, and 714 LLP, we respond to the complaint filed by the North Dakota Democratic-NPL Party, dated October 25, 2012, and designated MUR 6680.

The complaint alleges that Berg for Senate (the “Committee”) “made use of a private aircraft without paying for it” and “failed to report its use to the FEC.” Compl. at 1. In addition, the complaint alleges that such use “constitutes an excessive in-kind contribution from 714 LLP.” *Id.* at 4. These allegations are baseless and false. Moreover, the complaint is an obvious political ploy—it was filed twelve (12) days before the 2012 General Election by the North Dakota Democratic Party against the Republican nominee for U.S. Senate, in a race that was, at the time, a statistical tie.<sup>1</sup> The Federal Election Commission (the “Commission”) should find no reason to believe that Berg for Senate and 714 LLP violated the Federal Election Campaign Act of 1971, as amended (the “Act”) or Commission regulations, and should dismiss the matter.

<sup>1</sup> As is typical of Democrat complaints in the days leading up to an election, the North Dakota Democratic Party’s complaint was accompanied by a press conference and a fanfare of media attention spread throughout the political blogs and Twitter immediately preceding its filing. *See, e.g.,* John Celock, *Rick Berg, North Dakota Senate Candidate, Accused Of Misusing Private Airplane*, HUFF. POST, Oct. 25, 2012, available at [http://www.huffingtonpost.com/2012/10/25/rick-berg-plane-north-dakota\\_n\\_2019097.html](http://www.huffingtonpost.com/2012/10/25/rick-berg-plane-north-dakota_n_2019097.html). Such action demonstrates that this is not a serious complaint, but instead is designed to simply grab a quick headline.

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## **I. Factual Background**

Congressman Berg is a partner in two different partnerships, 714 LLP and Wheelberg LLP, each of which owns an aircraft. As one of four partners in 714 LLP, Congressman Berg has a one-fourth interest in the 714 aircraft. As one of three partners in Wheelberg LLP, Congressman Berg has one-third interest in the Wheelberg aircraft. As part owner of both aircraft, Congressman Berg pays an hourly fee for the use of the aircraft. For example, if Congressman Berg uses the 714 LLP aircraft, he pays an hourly fee to 714 LLP for his usage. Likewise, if he uses the Wheelberg aircraft, he pays Wheelberg LLP for his usage.

Red River Aero is a charter company and service provider that services and maintains the aircraft. Each of the partners, including Congressman Berg, pays Red River Aero for pilot time and fuel when they use the aircraft. Red River Aero issues quarterly invoices to each partner for these costs. As the service provider, Red River Aero also separately invoices the partners on behalf of 714 LLP and Wheelberg LLP for use of the aircraft. These invoices include the amount owed to either 714 LLP or Wheelberg LLP or both, and are also issued on a quarterly basis.

The Committee used the aircraft pursuant to the payment structure described above. The Committee was invoiced on a quarterly basis, and made payments to either 714 or Wheelberg for its use of the aircraft. The Committee also made separate payments to Red River Aero for pilot time and fuel costs. Moreover, each time the Committee used the aircraft, it obtained a certification, signed by the other partners, that such use of the aircraft on that particular occasion would not exceed Congressman Berg's proportional share of use under the ownership agreements of 714 LLP or Wheelberg LLP.

During the time period cited in the complaint, the Committee was invoiced for the flights and paid each invoice in a timely manner (see attachments). The Committee was invoiced on July 11, 2012 for use of the aircraft from April through June in the amount of \$1,261.74. This invoice was paid on July 25, 2012 to 714 LLP, and was disclosed on the Committee's October Quarterly Report. In addition, the Committee was invoiced by Red River Aero on June 11, 2012 for pilot time and fuel in the amount of \$3,856.43. This invoice was paid on July 25, 2012 and was also disclosed on the Committee's October Quarterly Report.

Likewise, the Committee was invoiced on October 6, 2012 in the amount of \$2,281.56 for usage of the aircraft from July through September. This invoice was paid on October 18, 2012 to 714 LLP, and is disclosed on the Committee's Post-General Election Report. The Committee was also invoiced by Red River Aero on October 6, 2012 for pilot time and fuel in the amount of \$4,254.04. This invoice was paid on October 18, 2012, as well, and is disclosed on the Committee's Post-General Election Report.

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## II. Legal Analysis

Under the Act, a "contribution" is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The phrase "anything of value" includes "the provision of goods or services without charge or at a charge that is less than the normal and usual charge for such goods or services. 11 C.F.R. § 100.52(d)(1). If goods or services are provided at less than the normal and usual charge, then the difference between what is charged and what would be usual and normal, results in an in-kind contribution. *Id.*

As a general rule, candidates who travel aboard a private aircraft "must pay the pro rata share per campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size" to avoid receiving an in-kind contribution from the person providing the travel service. 11 C.F.R. § 100.93(c)(1). There is an exception, however, for aircraft that are owned or leased by the candidate, whereby the candidate's authorized committee must pay:

In the case of travel on an aircraft that is owned or leased under a shared-ownership or other time-share arrangement, where the travel does not exceed the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the hourly, mileage, or other applicable rate charged the candidate, immediate family member, or other service provider for the costs of travel.

11 C.F.R. § 100.93(g)(1)(i).

If the candidate's use of the aircraft exceeds his or her proportional share of ownership interest the campaign must pay the usual and normal charter fare or rental charge for travel on a comparable aircraft of comparable size. 11 C.F.R. § 100.93(g)(1)(ii). Prior to each flight, the candidate's committee must confirm that the flight will not exceed the candidate's proportional share of use. 11 C.F.R. § 100.93(g)(3).

The regulations do not specify a time period for repayment when a candidate owns or has a shared-ownership interest in a private aircraft. Rather, the Commission determined that the candidate's authorized committee must make the repayment in accordance with the normal business practices of the entity administering the shared ownership or lease agreements. The Explanation and Justification for the Rulemaking on Campaign Travel states, in pertinent part:

The Commission is not specifying a time period for repayment in the rule itself in expectation that, in shared-ownership or lease arrangements, the candidate will make the repayment in accordance with the normal business practices of the entity administering the shared ownership or lease agreements. If not,

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that entity will be deemed to have made a loan to the candidate's committee that would, if not repaid within the required commercially reasonable period, become an in-kind contribution to the candidate's authorized committee, subject to the limits, prohibitions, and reporting requirements of the Act.

See Campaign Travel, Explanation and Justification, 74 Fed. Reg. 63951, 63962 (Dec. 7, 2009).

The complaint identifies "at least thirteen flights" that Congressman Berg took in connection with campaign travel that Complainant alleges the Committee did not pay for and did not report to the FEC. Compl. at 2 (emphasis in original). This allegation is false. While Congressman Berg did use the aircraft in connection with eleven of the flights identified by Complainant,<sup>2</sup> the Committee, in fact, paid for those flights "in accordance with the normal business practices" of 714 LLP and Wheelberg LLP, and reported the payments accordingly.

Per the normal business practices of 714 LLP, Wheelberg LLP and Red River Aero, the Committee was invoiced on a quarterly basis and promptly paid for the flights taken during the quarterly period. The July 11, 2012 invoices covered flights taken from April through June, including the June 30 flight identified by Complainant. On July 25, 2012, the Committee paid \$1,261.74 to 714 LLP for hourly use of the aircraft, and paid Red River Aero \$3,856.43 for pilot time and fuel. These payments were properly disclosed on the Committee's October Quarterly Report.

Likewise, the Committee was invoiced on October 6, 2012 for flights taken from July through September, and includes the remaining flights identified by Complainant. The invoices for use of the aircraft and for pilot time and fuel were paid on October 18, 2012. A payment to 714 LLP in the amount of \$2,281.56, and a payment to Red River Aero in the amount of \$4,254.04 appear on the Committee's Post-General Election Report. Thus, the flights identified by Complainant were paid for "in accordance with the normal business practices" of 714 LLP, Wheelberg LLP, and Red River Aero, and appear on the relevant FEC reports.

Importantly, the complaint offers no evidence in support of its allegation that Congressman Berg exceeded his proportional share of usage. To the contrary, the Committee complied with Commission regulations by obtaining certifications that Congressman Berg did not exceed the proportional share of use under the ownership agreements of 714 LLP or Wheelberg LLP. An example of such certification is attached. As such, no excessive in-kind contribution resulted from Congressman Berg's use of the aircraft.

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<sup>2</sup> Complainant alleges that Congressman Berg used the aircraft on June 23, 2012; however, this is inaccurate.

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The Commission may find "reason to believe" only if a complainant sets forth sufficient specific facts, which, if proven true, would constitute a violation of FECA. See MUR 4960 (Hillary Clinton), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and the Commission will dismiss a complaint if it consists of factual allegations that are refuted with sufficiently compelling evidence. *Id.*

The complaint in this matter was based on "information and belief" and not on "personal knowledge." It is purely speculative and without merit. The documentation provided clearly shows that the Committee paid for the flights in accordance with normal business practices, and that Congressman Berg did not exceed his proportional share of usage.

### III. Conclusion

The North Dakota Democratic-NPL Party in this matter has invoked an administrative process as a means to baselessly attack its political opponent in the waning days of a close election. The complaint is undercut by a lack of credibility and substantiation, and is based entirely on politically motivated and malicious speculation. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the complaint on its face and immediately dismiss it.

Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 572-8663 with any questions.

Respectfully submitted,



Charles R. Spies  
*Counsel to Berg for Senate and 714 LLP*

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